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Attorneys for Brandon Lo

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA**

**BRANDON LO, INDIVIDUALLY AND
ON BEHALF OF ALL OTHERS
SIMILARLY SITUATED**

PLAINTIFF,

v.

**OXNARD EUROPEAN MOTORS,
LLC D/B/A MERCEDES BENZ OF
OXNARD, AND OXNARD MB, LLC,
D/B/A MERCEDES BENZ OF
OXNARD & SMART CENTER OF
OXNARD,**

DEFENDANT.

Case No: '11CV1009 JLS MDD

CLASS ACTION

**COMPLAINT FOR DAMAGES AND
INJUNCTIVE RELIEF PURSUANT TO
THE TELEPHONE CONSUMER
PROTECTION ACT, 47 U.S.C. § 227
ET SEQ.**

Jury Trial Demanded

INTRODUCTION

- 1
- 2 1. Brandon Lo, (Plaintiff), through Plaintiff's attorneys, brings this class action
- 3 for damages, injunctive relief, and any other available legal or equitable
- 4 remedies resulting from the illegal actions of Oxnard European Motors, LLC
- 5 d/b/a Mercedes Benz of Oxnard ("Oxnard European Motors") and Oxnard
- 6 MB, LLC d/b/a Mercedes Benz of Oxnard & Smart Center of Oxnard
- 7 ("Oxnard MB") or collectively ("Defendants"), in negligently, and/or
- 8 willfully contacting Plaintiff on Plaintiff's cellular telephone, in violation of
- 9 the Telephone Consumer Protection Act, 47 U.S.C. § 227 et seq., ("TCPA"),
- 10 thereby invading Plaintiff's privacy. Plaintiff alleges as follows upon personal
- 11 knowledge as to herself and her own acts and experiences, and, as to all other
- 12 matters, upon information and belief, including investigation conducted by her
- 13 attorneys.

JURISDICTION AND VENUE

- 14
- 15 2. Jurisdiction of this Court arises pursuant to 28 U.S.C. § 1332(d)(2) because
- 16 Plaintiff seeks relief on behalf of a national class action, which will result in
- 17 at least one class member belonging to a different state than that of
- 18 Defendant. Plaintiff also seeks up to \$1,500 in damages for each call in
- 19 violation of the TCPA, which, when aggregated among a proposed class
- 20 number in tens of thousands, exceeds the \$5,000,000 threshold for federal
- 21 court jurisdiction. Therefore, both elements of diversity jurisdiction under the
- 22 Class Action Fairness Act of 2005 ("CAFA") are present and this Court has
- 23 jurisdiction.
- 24 3. Venue is proper in the United States District Court for the Southern District of
- 25 California pursuant to 18 U.S.C. § 1391(b) and 1441(a) because Defendants
- 26 do business within the State of California and Plaintiff received the illegal text
- 27 message while in San Diego County. Defendants are both corporations and
- 28 citizens of California.

PARTIES

- 1
- 2 4. Plaintiff is, and all times mentioned herein was, an individual citizen and
- 3 resident of the State of California. Plaintiff is, and all times mentioned herein
- 4 was, “person(s)” as defined by 47 U.S.C. §153 (10).
- 5 5. Defendants own one or more call dealerships, including, but not limited to at
- 6 least one dealership in Oxnard, California.
- 7 6. At all times mentioned herein, Defendants were and are corporations and
- 8 “person(s)” as defined by 47 U.S.C. § 152 (10). Oxnard European Motors
- 9 and Oxnard MB jointly do business together, including advertising, sales, and
- 10 service.

FACTUAL ALLEGATIONS

- 11
- 12 7. At all times relevant, Plaintiff was an individual residing within the State of
- 13 California. Plaintiff is, and at all times mentioned herein was, a “person” as
- 14 defined by 47 U.S.C. § 153 (10).
- 15 8. Defendants are, and at all times mentioned herein were, corporations and
- 16 “person(s),” as defined by 47 U.S.C. § 153 (10).
- 17 9. At all times relevant all Defendants conducted business in the State of
- 18 California.
- 19 10. Plaintiff maintains cellular service with a common cellular telephone service
- 20 provider and maintains cellular telephone number 818-577-0576. Plaintiff
- 21 has maintained this cellular telephone for years.
- 22 11. Plaintiff has never provided this cellular telephone number to Defendants or
- 23 provided any type of prior express consent to receive sales solicitations
- 24 through Plaintiff’s cellular telephone.
- 25 12. On April 9, 2011 at approximately 8:04 a.m. Plaintiff received an unsolicited
- 26 advertisement, via text message from Defendants sent to Plaintiff’s cellular
- 27 telephone number, as listed above.
- 28

13. The telephone identification number provided in the text message read “From 431-43.” The text message stated in pertinent part:
 “Mercedes-Benz of Oxnard Service Notice: You may be past due for service!
 Please call to schedule:
(877) 253-4239. To opt out, Reply STOP.”
14. On April 9, 2011, all prior to the date this Complaint was filed, but sometime after four years prior to the date this Complaint was filed, Defendants contacted Plaintiff on Plaintiff’s cellular telephone via an “automatic telephone dialing system,” as defined by 47 U.S.C. § 227 (a)(1).
15. During this telephone call and/or sending of the unsolicited text message, Defendant used “an artificial or prerecorded voice” as prohibited by 47 U.S.C. § 227 (b)(1)(A).
16. The telephone number Defendants called and/or sent the unsolicited text message was assigned to a cellular telephone service for which Plaintiff incurs a charge for incoming calls pursuant to 47 U.S.C. § 227 (b)(1).
17. These telephone call and/or unsolicited text message constituted a call that was not for emergency purposes as defined by 47 U.S.C. § 227 (b)(1)(A)(i).
18. Plaintiff did not provide prior express consent to receive calls and/or unsolicited text messages on Plaintiff’s cellular telephone, pursuant to 47 U.S.C. § 227 (b)(1)(A).
19. These telephone calls by Defendants violated 47 U.S.C. § 227(b)(1).
20. In response to receiving this unsolicited text message, Plaintiff replied “Stop.”
21. In response, Defendants then sent another unsolicited text message to Plaintiff which stated in pertinent part:
 “Your subscription to ZAdv alerts has been cancelled
 & you will no longer recv

1 msgs or charges. 4 help
2 visit
3 <http://www.3csms.mobi/za>
4 dv.”

5 22. During this telephone call and/or sending of the unsolicited text message,
6 Defendants used “an artificial or prerecorded voice” as prohibited by 47
7 U.S.C. § 227 (b)(1)(A).

8 23. The telephone number Defendants called and/or sent the unsolicited text
9 message was assigned to a cellular telephone service for which Plaintiff
10 incurs a charge for incoming calls pursuant to 47 U.S.C. § 227 (b)(1).

11 24. These telephone call and/or unsolicited text message constituted a call that
12 was not for emergency purposes as defined by 47 U.S.C. § 227 (b)(1)(A)(i).

13 25. Plaintiff did not provide prior express consent to receive calls and/or
14 unsolicited text messages on Plaintiff’s cellular telephone, pursuant to 47
15 U.S.C. § 227 (b)(1)(A).

16 26. These telephone calls by Defendants violated 47 U.S.C. § 227(b)(1).

17 **CLASS ACTION ALLEGATIONS**

18 27. Plaintiff brings this action on behalf of herself and on behalf of and all others
19 similarly situated (“the Class”).

20 28. Plaintiff represents, and is a member of, the Class, consisting of all persons
21 within the United States who received any telephone call and/or text message
22 from Defendant or its agent to said person’s cellular telephone made through
23 the use of any automatic telephone dialing system or with an artificial or
24 prerecorded voice, which call was not made for emergency purposes or with
25 the recipient’s prior express consent, within the four years prior to the filing
26 of this Complaint.

27 29. Defendants and its employees or agents are excluded from the Class. Plaintiff
28 does not know the number of members in the Class, but believes the Class

members number in the tens of thousands, if not more. Thus, this matter should be certified as a Class action to assist in the expeditious litigation of this matter.

30. Plaintiff and members of the Class were harmed by the acts of Defendants in at least the following ways: Defendants illegally contacted Plaintiff and the Class members via their cellular telephones thereby causing Plaintiff and the Class members to incur certain cellular telephone charges or reduce cellular telephone time for which Plaintiff and the Class members previously paid, by having to retrieve or administer messages left by Defendants during those illegal calls and/or text messages, and invading the privacy of said Plaintiff and the Class members. Plaintiff and the Class members were damaged thereby.

31. This suit seeks only damages and injunctive relief for recovery of economic injury on behalf of the Class and it expressly is not intended to request any recovery for personal injury and claims related thereto. Plaintiff reserves the right to expand the Class definition to seek recovery on behalf of additional persons as warranted as facts are learned in further investigation and discovery.

32. The joinder of the Class members is impractical and the disposition of their claims in the Class action will provide substantial benefits both to the parties and to the court. The Class can be identified through Defendants' records or Defendants' agents' records.

33. There is a well-defined community of interest in the questions of law and fact involved affecting the parties to be represented. The questions of law and fact to the Class predominate over questions which may affect individual Class members, including the following:

- a. Whether, within the four years prior to the filing of this Complaint, Defendants made any call and/or sent any unsolicited text messages

(other than a call made for emergency purposes or made with the prior express consent of the called party) to a Class member using any automatic telephone dialing system or an artificial or prerecorded voice to any telephone number assigned to a cellular telephone service.

b. Whether Plaintiff and the Class members were damaged thereby, and the extent of damages for such violation; and

c. Whether Defendant should be enjoined from engaging in such conduct in the future.

34. As a person that received a call and/or unsolicited text message, using an automatic telephone dialing system or an artificial or prerecorded voice, without Plaintiff's prior express consent, Plaintiff is asserting claims that are typical of the Class. Plaintiff will fairly and adequately represent and protect the interests of the Class in that Plaintiff has no interests antagonistic to any member of the Class.

35. Plaintiff and the members of the Class have all suffered irreparable harm as a result of the Defendants' unlawful and wrongful conduct. Absent a class action, the Class will continue to face the potential for irreparable harm. In addition, these violations of law will be allowed to proceed without remedy and Defendants will likely continue such illegal conduct. Because of the size of the individual Class member's claims, few, if any, Class members could afford to seek legal redress for the wrongs complained of herein.

36. Plaintiff has retained counsel experienced in handling class action claims and claims involving violations of the Telephone Consumer Protection Act.

37. A class action is a superior method for the fair and efficient adjudication of this controversy. Class-wide damages are essential to induce Defendants to comply with federal and California law. The interest of Class members in individually controlling the prosecution of separate claims against Defendant

1 is small because the maximum statutory damages in an individual action for
2 violation of privacy are minimal. Management of these claims is likely to
3 present significantly fewer difficulties than those presented in many class
4 claims.

- 5 38. Defendants have acted on grounds generally applicable to the Class, thereby
6 making appropriate final injunctive relief and corresponding declaratory relief
7 with respect to the Class as a whole.

8
9 **FIRST CAUSE OF ACTION**
10 **NEGLIGENT VIOLATIONS OF THE TELEPHONE CONSUMER PROTECTION ACT**
11 **47 U.S.C. § 227 *ET SEQ.***

- 12 39. Plaintiff incorporates by reference all of the above paragraphs of this Complaint
13 as though fully stated herein.

- 14 40. The foregoing acts and omissions of Defendants constitutes numerous and
15 multiple negligent violations of the TCPA, including but not limited to each and
16 every one of the above-cited provisions of 47 U.S.C. § 227 *et seq.*

- 17 41. As a result of Defendants' negligent violations of 47 U.S.C. § 227 *et seq.*,
18 Plaintiff and The Classes are entitled to an award of \$500.00 in statutory
19 damages, for each and every violation, pursuant to 47 U.S.C. § 227(b)(3)(B).

- 20 42. Plaintiff and the The Classes are also entitled to and seek injunctive relief
21 prohibiting such conduct in the future.

22 **SECOND CAUSE OF ACTION**
23 **KNOWING AND/OR WILLFUL VIOLATIONS OF THE**
24 **TELEPHONE CONSUMER PROTECTION ACT**
25 **47 U.S.C. § 227 *ET SEQ.***

- 26 43. Plaintiff incorporates by reference all of the above paragraphs of this Complaint
27 as though fully stated herein.

- 28 44. The foregoing acts and omissions of Defendants constitutes numerous and
multiple knowing and/or willful violations of the TCPA, including but not

limited to each and every one of the above-cited provisions of 47 U.S.C. § 227 *et seq.*

45. As a result of Defendants' knowing and/or willful violations of 47 U.S.C. § 227 *et seq.*, Plaintiff and each of the The Classes are entitled to treble damages, as provided by statute, up to \$1,500.00, for each and every violation, pursuant to 47 U.S.C. § 227(b)(3)(B) and 47 U.S.C. § 227(b)(3)(C).

46. Plaintiff and the The Classes are also entitled to and seek injunctive relief prohibiting such conduct in the future.

PRAYER FOR RELIEF

Wherefore, Plaintiff respectfully requests the Court grant Plaintiff and The Class members the following relief against Defendant:

FIRST CAUSE OF ACTION FOR NEGLIGENT VIOLATION OF THE TCPA, 47 U.S.C. § 227 *ET SEQ.* *AS TO ALL DEFENDANTS*

- As a result of Defendants' negligent violations of 47 U.S.C. § 227(b)(1), Plaintiff seeks for herself and each Class and Subclass member \$500.00 in statutory damages, for each and every violation, pursuant to 47 U.S.C. § 227(b)(3)(B).
- Pursuant to 47 U.S.C. § 227(b)(3)(A), injunctive relief prohibiting such conduct in the future.
- Any other relief the Court may deem just and proper.

SECOND CAUSE OF ACTION FOR KNOWING AND/OR WILLFUL VIOLATION OF THE TCPA, 47 U.S.C. § 227 *ET SEQ.* *AS TO ALL DEFENDANTS*

- As a result of Defendants' willful and/or knowing violations of 47 U.S.C. § 227(b)(1), Plaintiff seeks for herself and each Class and Subclass member treble damages, as provided by statute, up to

1 \$1,500.00 for each and every violation, pursuant to 47 U.S.C. § 227(b)
2 (3)(B) and 47 U.S.C. § 227(b)(3)(C).

- 3 • Pursuant to 47 U.S.C. § 227(b)(3)(A), injunctive relief prohibiting such
4 conduct in the future.
5 • Any other relief the Court may deem just and proper.
6

7 **TRIAL BY JURY**

8 Pursuant to the seventh amendment to the Constitution of the United States
9 of America, Plaintiff is entitled to, and demands, a trial by jury.
10

11 Respectfully submitted,

12 **Hyde & Swigart**

13
14 Date: 5/9/11

15 By: /s/ Joshua Swigart
16 Joshua B. Swigart
17 Attorneys for Plaintiff
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HYDE & SWIGART
San Diego, California

CIVIL COVER SHEET

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON THE REVERSE OF THE FORM.)

I. (a) PLAINTIFFS

Brandon Lo

(b) County of Residence of First Listed Plaintiff San Diego
(EXCEPT IN U.S. PLAINTIFF CASES)

(c) Attorney's (Firm Name, Address, and Telephone Number)

Hyde & Swigart
411 Camino Del Rio South Suite 301, San Diego, CA 92108
619.233.7770

DEFENDANTS

Oxnard European Motors, LLC d/b/a Mercedes Benz of Oxnard, and Oxnard MB, LLC, d/b/a Mercedes Benz of Oxnard & Smart Center of Oxnard

County of Residence of First Listed Defendant Oxnard, California
(IN U.S. PLAINTIFF CASES ONLY)

NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE LAND INVOLVED.

Attorneys (If Known)

'11CV1009 JLS MDD

II. BASIS OF JURISDICTION (Place an "X" in One Box Only)

- ☐ 1 U.S. Government Plaintiff
- ☒ 3 Federal Question (U.S. Government Not a Party)
- ☐ 2 U.S. Government Defendant
- ☐ 4 Diversity (Indicate Citizenship of Parties in Item III)

III. CITIZENSHIP OF PRINCIPAL PARTIES (Place an "X" in One Box for Plaintiff and One Box for Defendant)

- | | PTF | DEF | | PTF | DEF |
|---|----------------------------|----------------------------|---|----------------------------|----------------------------|
| Citizen of This State | <input type="checkbox"/> 1 | <input type="checkbox"/> 1 | Incorporated or Principal Place of Business In This State | <input type="checkbox"/> 4 | <input type="checkbox"/> 4 |
| Citizen of Another State | <input type="checkbox"/> 2 | <input type="checkbox"/> 2 | Incorporated and Principal Place of Business In Another State | <input type="checkbox"/> 5 | <input type="checkbox"/> 5 |
| Citizen or Subject of a Foreign Country | <input type="checkbox"/> 3 | <input type="checkbox"/> 3 | Foreign Nation | <input type="checkbox"/> 6 | <input type="checkbox"/> 6 |

IV. NATURE OF SUIT (Place an "X" in One Box Only)

CONTRACT	TORTS	FORFEITURE/PENALTY	BANKRUPTCY	OTHER STATUTES
<input type="checkbox"/> 110 Insurance <input type="checkbox"/> 120 Marine <input type="checkbox"/> 130 Miller Act <input type="checkbox"/> 140 Negotiable Instrument <input type="checkbox"/> 150 Recovery of Overpayment & Enforcement of Judgment <input type="checkbox"/> 151 Medicare Act <input type="checkbox"/> 152 Recovery of Defaulted Student Loans (Excl. Veterans) <input type="checkbox"/> 153 Recovery of Overpayment of Veteran's Benefits <input type="checkbox"/> 160 Stockholders' Suits <input type="checkbox"/> 190 Other Contract <input type="checkbox"/> 195 Contract Product Liability <input type="checkbox"/> 196 Franchise	PERSONAL INJURY <input type="checkbox"/> 310 Airplane <input type="checkbox"/> 315 Airplane Product Liability <input type="checkbox"/> 320 Assault, Libel & Slander <input type="checkbox"/> 330 Federal Employers' Liability <input type="checkbox"/> 340 Marine <input type="checkbox"/> 345 Marine Product Liability <input type="checkbox"/> 350 Motor Vehicle <input type="checkbox"/> 355 Motor Vehicle Product Liability <input type="checkbox"/> 360 Other Personal Injury PERSONAL INJURY <input type="checkbox"/> 362 Personal Injury - Med. Malpractice <input type="checkbox"/> 365 Personal Injury - Product Liability <input type="checkbox"/> 368 Asbestos Personal Injury Product Liability PERSONAL PROPERTY <input type="checkbox"/> 370 Other Fraud <input type="checkbox"/> 371 Truth in Lending <input type="checkbox"/> 380 Other Personal Property Damage <input type="checkbox"/> 385 Property Damage Product Liability	<input type="checkbox"/> 610 Agriculture <input type="checkbox"/> 620 Other Food & Drug <input type="checkbox"/> 625 Drug Related Seizure of Property 21 USC 881 <input type="checkbox"/> 630 Liquor Laws <input type="checkbox"/> 640 R.R. & Truck <input type="checkbox"/> 650 Airline Regs. <input type="checkbox"/> 660 Occupational Safety/Health <input type="checkbox"/> 690 Other	<input type="checkbox"/> 422 Appeal 28 USC 158 <input type="checkbox"/> 423 Withdrawal 28 USC 157 PROPERTY RIGHTS <input type="checkbox"/> 820 Copyrights <input type="checkbox"/> 830 Patent <input type="checkbox"/> 840 Trademark SOCIAL SECURITY <input type="checkbox"/> 861 HIA (1395ff) <input type="checkbox"/> 862 Black Lung (923) <input type="checkbox"/> 863 DIWC/DIWW (405(g)) <input type="checkbox"/> 864 SSID Title XVI <input type="checkbox"/> 865 RSI (405(g)) FEDERAL TAX SUITS <input type="checkbox"/> 870 Taxes (U.S. Plaintiff or Defendant) <input type="checkbox"/> 871 IRS—Third Party 26 USC 7609	<input type="checkbox"/> 400 State Reapportionment <input type="checkbox"/> 410 Antitrust <input type="checkbox"/> 430 Banks and Banking <input type="checkbox"/> 450 Commerce <input type="checkbox"/> 460 Deportation <input type="checkbox"/> 470 Racketeer Influenced and Corrupt Organizations <input type="checkbox"/> 480 Consumer Credit <input type="checkbox"/> 490 Cable/Sat TV <input type="checkbox"/> 810 Selective Service <input type="checkbox"/> 850 Securities/Commodities/Exchange <input type="checkbox"/> 875 Customer Challenge 12 USC 3410 <input checked="" type="checkbox"/> 890 Other Statutory Actions <input type="checkbox"/> 891 Agricultural Acts <input type="checkbox"/> 892 Economic Stabilization Act <input type="checkbox"/> 893 Environmental Matters <input type="checkbox"/> 894 Energy Allocation Act <input type="checkbox"/> 895 Freedom of Information Act <input type="checkbox"/> 900 Appeal of Fee Determination Under Equal Access to Justice <input type="checkbox"/> 950 Constitutionality of State Statutes
REAL PROPERTY <input type="checkbox"/> 210 Land Condemnation <input type="checkbox"/> 220 Foreclosure <input type="checkbox"/> 230 Rent Lease & Ejectment <input type="checkbox"/> 240 Torts to Land <input type="checkbox"/> 245 Tort Product Liability <input type="checkbox"/> 290 All Other Real Property	CIVIL RIGHTS <input type="checkbox"/> 441 Voting <input type="checkbox"/> 442 Employment <input type="checkbox"/> 443 Housing/Accommodations <input type="checkbox"/> 444 Welfare <input type="checkbox"/> 445 Amer. w/Disabilities - Employment <input type="checkbox"/> 446 Amer. w/Disabilities - Other <input type="checkbox"/> 440 Other Civil Rights	PRISONER PETITIONS <input type="checkbox"/> 510 Motions to Vacate Sentence Habeas Corpus: <input type="checkbox"/> 530 General <input type="checkbox"/> 535 Death Penalty <input type="checkbox"/> 540 Mandamus & Other <input type="checkbox"/> 550 Civil Rights <input type="checkbox"/> 555 Prison Condition	LABOR <input type="checkbox"/> 710 Fair Labor Standards Act <input type="checkbox"/> 720 Labor/Mgmt. Relations <input type="checkbox"/> 730 Labor/Mgmt. Reporting & Disclosure Act <input type="checkbox"/> 740 Railway Labor Act <input type="checkbox"/> 790 Other Labor Litigation <input type="checkbox"/> 791 Empl. Ret. Inc. Security Act IMMIGRATION <input type="checkbox"/> 462 Naturalization Application <input type="checkbox"/> 463 Habeas Corpus - Alien Detainee <input type="checkbox"/> 465 Other Immigration Actions	

V. ORIGIN

(Place an "X" in One Box Only)

- ☒ 1 Original Proceeding
- ☐ 2 Removed from State Court
- ☐ 3 Remanded from Appellate Court
- ☐ 4 Reinstated or Reopened
- ☐ 5 Transferred from another district (specify)
- ☐ 6 Multidistrict Litigation
- ☐ 7 Appeal to District Judge from Magistrate Judgment

VI. CAUSE OF ACTION

Cite the U.S. Civil Statute under which you are filing. (Do not cite jurisdictional statutes unless diversity):
47 U.S.C. § 227 et seq 28:1331 (JMD)

Brief description of cause:
Telephonic Consumer Protection Act (TCPA)

VII. REQUESTED IN COMPLAINT:

☒ CHECK IF THIS IS A CLASS ACTION UNDER F.R.C.P. 23

DEMAND \$ 5,000,000.00

CHECK YES only if demanded in complaint:
JURY DEMAND: ☒ Yes ☐ No

VIII. RELATED CASE(S) IF ANY

(See instructions):

JUDGE

DOCKET NUMBER

DATE 5/9/11 SIGNATURE OF ATTORNEY OF RECORD [Signature]

FOR OFFICE USE ONLY

RECEIPT # _____ AMOUNT _____ APPLYING IFP _____ JUDGE _____ MAG. JUDGE _____